TING CHONG MAA

v.

CHOR SEK CHOON

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 22-223-1987]
31 JANUARY 1989

***COMPANY LAW*:** *Civil Procedure - Application to strike out statement of claim - Right of individual shareholder to sue for benefit of company - Not a minority shareholder - Alleged wrongdoer had de facto control of company - Alleged wrongdoer was shareholder and managing director - Secret profits - Plaintiff had locus standi.*

The applicant/defendant made an application to strike out the statement of claim on the ground that the respondent/plaintiff did not have *locus standi*. The respondent had filed a claim for accounts and enquiries of secret profits which the applicant had obtained from the company where both parties owned the issued capital in equal shares. The applicant was the managing director of the company.

Held:
The respondent had *locus standi* to bring the claim for the benefit of the company. Although the respondent was not a minority shareholder, the applicant had *de facto* control of the company as managing director. The applicant was the alleged wrongdoer who was in control of the company and was alleged to have committed a fraud on the company. Therefore, the respondent was covered by the exception to the rule in *Foss v. Harbottle* that an individual shareholder could not sue for a wrong done on the company.

[Application dismissed with costs.]

For the plaintiff - Loh Yew Dong; M/s. Loh Yew Dong & Co.
For the defendant - Lau Cheong; M/s. Albar, Zulkifly & Yap

JUDGMENT

Peh Swee Chin J:

Once again, a point of fairly frequent controversy has cropped up before me. I told Counsel I would deliver a short written judgment and here I do.

The point in question is that of a shareholder of a company suing, for the company; an supposedly erring director of the company but is faced with an immediate objection from the director that such action is not competent, or as is stated in the present case, that plaintiff has no *locus standi.*

The shareholder, i.e. the plaintiff, and the director, i.e. the defendant, both own equally the equity of the company. Plaintiff, in a nutshell, alleges that defendant has obtained secret profits by diverting the company's customers to another firm. Plaintiff claims therefore accounts and enquiries and payment of sum found due thereon.

By summons, the defendant has applied for the statement of claim to be struck out on the ground that plaintiff has no *locus standi* to file the present action, and in the alternative, on grounds which I need not deal with as no argument was advanced by both parties on them, neither was anything stated in any affidavit in regard to them. The real bone of contention has therefore been the question of *locus standi*.

Certain principles, relevant to this case, have to be briefly stated first. There is also that kind of democracy of rule by the majority in companies except that the rights and remedies of minority shareholders are fairly and adequately set out in our Companies Act. Since shareholders of the company exercise their control over the company through general meetings, they can bring about the appointment and removal of directors. Therefore the majority shareholders in effect control the directors. If the directors are supported by such majority shareholders, the minority shareholders are therefore rendered to being either spectators or victims. The leading case of *Foss v. Harbottle*, [1843] 2 Hare 461 testifies to this majority rule by holding to the effect that an individual shareholder of a company cannot sue, for a wrong done to the company, in his individual name on the grounds that the company is the true and proper plaintiff and that in any event, the alleged wrong could be, if need be, ratified by a simple majority of members, in other words, the majority shareholders should be left to decide whether to commence proceedings against the miscreants, viz. the misbehaving directors.

I pause to observe that the rule in *Foss v. Harbottle* applies to actions filed expressly or from their nature, impliedly by minority shareholders for the benefit of their company as in the instant case. It does not apply to action by shareholders in their own names for direct infringement of their personal rights *qua* shareholders which are usually conferred by Companies Act, to cite just one example, e.g. a shareholder of a company has a right to petition for winding up the company on ground that the affairs of the company are being conducted in an oppressive manner under s. 181(i)(a) of the Companies Act. An action of this kind concerning the infringement of personal rights of shareholders is also an internal fight or dispute in substance between a shareholder and his company, for an alleged wrong done to the shareholder by the company, and not the other way round as in this case.

The rule in *Foss v. Harbottle* however has given rise, through the cases to 3 exceptions i.e. when a shareholder of a company can sue in his own name for the benefit of the company. The 3 exceptions are acts which in effect, cannot be ratified by the majority shareholders at a general meeting. They are (1), any act which is *ultra vires* to the company, extending to any illegal act it being not necessary that it must be always an act *ultra vires* the memorandum or articles of association of the company. Please see *Edwards v. Haliwel*, [1950] 2 All ER 1064; (2) any act which is a fraud on the minority, and that the alleged wrongdoers control the company, and (3) an act, which can only be effective, if resolved by a specific resolution (which is more than simple majority) and which is resolved by a simple majority.

The instant case however is not true to type; for both plaintiff and defendant own the issued capital in equal shares. But for this aberration, if the plaintiff were a minority shareholder and the defendant a majority shareholder, the averments in the statement of claim would *prima facie* suggest a fraud on the minority, and the defendant, being the alleged wrongdoer, and being also a majority shareholder, would be in control, this case would have fallen neatly within exception No. 2 to the rule in *Foss v. Harbottle*, and the plaintiff would have the *locus standi* on the assumed basis of the plaintiff being a true minority shareholder.

I deal now with what I call the aberration. There is no clear majority so that the plaintiff cannot be in truth a minority shareholder nor the defendant a majority shareholder. However, in my view, being a majority or minority shareholder is not a conclusive test for what the said exception No. 2 says is that the alleged wrongdoer is in control. In the instant case, the defendant has been the managing director, other things being equal, he would *prima facie* have *de facto* control of the company. Control here should, in my view, include *de facto* control though the defendant has less than a clear majority of shares.

For the reasons stated above, the plaintiff has the *locus standi* to maintain this action, which was filed properly. I therefore dismiss the defendant's application, with costs to the plaintiff in any event. Before departing from this case which has one unusual feature of having 2 shareholders owning equal shares in the company, I wish to point out that when there are more than 2 shareholders, the plaintiff in suing for a wrong done to his company, and bringing himself within an exception to the rule in *Foss v. Harbottle*, ought to sue in a representative capacity on behalf of himself and all other shareholders or members other than the real defendant or defendants under O. 15 r. 12 of Rules of High Court. There are two advantages first, any judgment given will be *res judicata* as regards members so represented, and secondly, the member so represented are not liable for costs. All such members would be liable for costs if they join as plaintiffs.

I wish to further point out that it is at least desirable, if not essential, that a company in an action similar to the present be made a co-defendant, since it cannot be plaintiff as both its 2 vital organs, viz. board of directors and general meeting would not authorise such Court action. As a defendant, any judgment may be given in its favour when the defendant/company is in a position to counterclaim from the real defendants, if not, it will be at least *res judicata* for the company and this will prevent subsequent emerging majority shareholders, if any, from starting another action again against the "real" defendant.

Also found at [1989] 1 CLJ 813